IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

In the Matter of the Petition of CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT TRUST COMPANY, *Petitioners,* vs. UNITED STATES OF AMERICA, *Respondent.*	Petition for Writ of Certiorari.

BRIEF OF PETITIONERS.

I.

A creditor's bill can be brought only for the collection of debts. It can not be used as ancillary to a criminal prosecution. A judgment imposing a fine does not create a debt, nor does the Government become a judgment creditor. Such a judgment is personal and directed against the defendant himself. It

can not be collected against heirs, executors or assigns, nor can it be collected against stockholders of a corporation.

Chicago v. Morell, 274 Ill. 383;
Peterson v. State, 79 Neb. 132;
Hall v. Coleman, 138 Ga. 734;
Spaulding v. State *ex rel.* Backus, 45 U. S. 21, *l. c.* 24;
In re Southern Steel Co., 183 Fed. 498;
State v. Morgan, 141 N. C. 726;
Henley v. Myers, 76 Kan. 723;
State v. Streen, 14 Tex. 396, *l. c.* 398;
People v. Ry., 129 Calif. 545, 79 Am. St. R. 137;
In re McDonald, 4 Wyo. 150;
McCool v. State, 23 Ind. 127, *l. c.* 132;
Ex parte Roberts, 27 Tex. App. 628, 11 Am. St. R. 207;
In re Southerland, 23 Fed. Cas. 456, *l. c.* 457;
Spaulding v. People, 7 Hill 301;
Spaulding v. N. Y., 45 U. S. 21;
Whiteacre v. Rector (Va.), 26 Am. R. 420.

II.

A fine imposed as a punishment for crime can, because of its nature, be enforced only against the person convicted of the crime.

U. S. v. Thuerer, 213 Fed. 964;
Wisconsin v. Pelican Insurance Co., 127 U. S. 265;
Hunting v. Attrill, 146 U. S. 657;
Black on Judgments, Sec. 870;
Dyar v. U. S., 186 Fed. 614;
U. S. v. Mitchell, 163 Fed. 1014, and 173 Fed. 254;

In re Greene, 52 Fed. 104;
U. S. v. Wood, 154 Fed. 405;
Union Pacific Coal Co. v. U. S. 173, Fed 737, *l. c.* 739;
N. Y. Central R. R. Co. v. U. S., 212 U. S. 481.

III.

A judgment assessing a fine does not convert the criminal responsibility of the defendant into a debt. This is true whether the form or action be by indictment, information, or civil suit, nor does the Government become a creditor. If there is no debtor there can be no creditor.

Adams v. Woods, 2 Cranch. 336;
Nicolin v. Weiland, 55 Minn. 130;
Woolverton v. Taylor, 43 Ill. App 424, *l. c.* 426, 132 Ill. 197;
Moler v. Minnesota Elevator Co., 40 Minn. 343.

IV.

The conviction was obtained on March 20th, 1914. The transfer by Waters Pierce Oil Company to the Pierce Oil Corporation took place on July 9th, 1913. If a debt was created by the conviction, it was not created until that day; hence, since the transfer took place previous to the conviction, the United States would be a subsequent creditor, if a creditor at all, and, therefore, would not be entitled to maintain a creditor's bill.

Graham v. Railroad, 102 U. S. 148, 26 L. Ed. 106.

V.

The statutes of the United States prescribe the method for collecting fines and the Government is restricted to the methods prescribed.

R. S. U. S., Sec. 1041;
Ex parte Watkins, 7 Peters 568;
Fischer v. Hayes, 6 Fed. 63;
Ex parte Barclay, 153 Fed. 669;
U. S. v. Union Supply Co., 215 U. S. 50;
Jones v. U. S., 137 U. S. 202;
U. S. v. Britton, 108 U. S. 199, *l. c.* 206;
U. S. v. Hudson & Goodwin, 7 Cranch. 32;
U. S. v. Eaton, 144 U. S. 677, *l. c.* 687;
Manchester v. Mass. 139 U. S. 240, *l. c.* 262;
U. S. v. Hall, 98 U. S. 343, *l. c.* 345;
U. S. v. Ortega, 11 Wheat. 468;
U. S. v. Martin, 176 Fed. 110, *l. c.* 112;
U. S. v. Grimaud, 170 Fed. 205;
U. S. v. Boyer, 85 Fed. 425, *l. c.* 436;
Hudson v. Wood, 119 Fed. 764;
Bucyrus Co. v. McArthur, 219 Fed. 266.

VI.

It is admitted that the appellants acted in good faith. There is no fraud suggested in the record. In case of a fraudulent dissolution of a corporation, however, the statutes provide for the punishment of the persons guilty of the fraud.

35 Statutes at Large, Section 1096;
U. S. Penal Code, Sec. 37.

The statutory remedies are exclusive and a creditor's bill cannot be used in aid of a criminal prosecution.

Yates v. Seitz, 7 D. C. 11, *l. c.* 27;
Hunnecke v. Dold, 7 N. M. 5;
Moore v. Baker, 34 Fed. 1, *l. c.* 3;
Bank v. Belk, 94 N. W. 617, *l. c.* 618;
Gould v. Torrance, 19 How. Pr. 360;
Feldenheimer v. Tressel, 6 Dakota 265;
Cunningham v. Cleveland, 98 Fed. 657, *l. c.* 665.

VII.

The judgment was unconstitutional as an attempt to punish appellants for the acts of a corporation without an indictment against the appellants and without a trial by jury in violation of the Sixth Amendment to the Constitution of the United States. The judgment was also a violation of the Fifth Amendment to the Constitution of the United States in that it deprived appellants of property without due process of law.

In re Nielsen, 131 U. S. 176;
In re Bonner, 151 U. S. 242;
And cases cited under Point II, *supra*.

VIII.

The funds and assets of the Waters Pierce Oil Company which were distributed to the stockholders did not constitute a trust fund for the benefit of creditors and could not be followed by the Government into the

hands of such stockholders nor could the Government obtain a general judgment against the stockholders on account of the receipt by them of such funds and assets.

Coleman v. Hagey, 252 Mo. 102, *l. c.* 136;
Hageman v. R. R., 202 Mo., *l. c.* 264;
Hollins v. Brierfield Co., 150 U. S., *l. c.* 385;
Graham v. R. R., 102 U. S. 148;
Wabash, Etc., Co. v. Ham, 114 U. S. 587, *l. c.* 594;
Savings Bank v. Ritchie, 121 Fed. 956, *l. c.* 959;
Lawrence v. Greenup, 97 Fed. 906;
Am. Ex. Bank v. Ward, 111 Fed. 782.

IX.

The Government has a plain, adequate and complete remedy at law and therefore can not maintain the present bill.

Judicial Code, Section 263, R. S. U. S. 723;
Rees v. Watertown, 19 Wall. 107;
Thompson v. Allen County, 115 U. S. 550;
Baltimore Safe Deposit Co. v. Anniston, 96 Fed. 663;
Grading Dist. v. Hagedorn, 186 Fed. 451.

X.

The Government is barred and estopped by its election of remedies, having brought suit against the Pierce Oil Corporation before filing the present bill.

Friedenwald Co. v. Ashville Tobacco Works, 117 N. C. 544;
15 Cyc., 259 and 262.

XI.

The bill was prematurely brought. There had been no judgment obtained against the Waters Pierce Oil Company in Missouri and no return of execution *nulla bona* in Missouri prior to the filing of the bill.

12 Cyc, 25;
Wae v. Delahaye, 95 Iowa 667;
Bank v. McCormick, 44 Atl. 706;
National Tube Works Co. v. Ballou, 146 U. S. 517;
Walser v. Seligman, 13 Fed. 415;
Taylor v. Bowker, 111 U. S. 110;
McElmoyle v. Cohen, 38 U. S. 312.

XII.

The execution issued by the District Court of the Western District of Louisiana addressed to the Marshal of the Eastern District of Missouri was void.

R. S. U. S., Sec. 986;
R. S. U. S., Sec. 1041;
Re Wood, 210 U. S. 246, *l. c.* 260;
Toland v. Sprague, 12 Peters 300, *l. c.* 328;
Allen v. Clark, 126 Fed. 738.

XIII.

The decree of the District Court below awarding interest at 6 per cent from January 29th, 1907, being the day of the indictment, was affirmed by the Circuit

Court of Appeals, Eighth Circuit. This was manifest error.

United States v. Jacob Schmidt Brew. Co., 254 Fed. 714;
State v. Streen, 14 Tex. 396, 398;
People v. Railway, 129 Cal. 545, 79 Am. St. Rep. 137.

Most of the questions of law involved have not been passed upon by this Court or by any Federal Court. It is to the interest of the public and jurisprudence that these questions should be settled for the above reasons and for the further reason that the petitioners feel aggrieved by the decision of the Circuit Court of Appeals, Eighth Circuit, in the matters and things aforesaid. We respectfully submit that the writ prayed for should be issued.

Respectfully submitted,

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Of Counsel.

St. Louis, September 22, 1919.

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Supreme Court of the United States

OCTOBER TERM—1920.

No. 173.

CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT COMPANY,

Appellants,

against

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLANTS' POINTS.

LOUIS MARSHALL,
of Counsel.

PRESS OF FREMONT PATEK, 80 Washington Street, New York City.

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 173.

CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT COMPANY, Appellants, against THE UNITED STATES OF AMERICA.	Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLANTS' POINTS.

This action was brought as a creditor's suit against the appellants, the Waters Pierce Oil Company, and Henry S. Priest and Clay Arthur Pierce, as trustees, for a decree charging them with liability to the extent of $14,000, the amount of a fine imposed on the Waters Pierce Oil Company on its conviction for receiving certain rebates and concessions in violation of the Elkins Act of February 19, 1903 (*Rec.*, pages 16-21).

The facts were stipulated (*Rec.*, page 30), and are as follows: The Waters Pierce Oil Company was a Missouri corporation, having its principal place of business at St. Louis, Mo. On January 29, 1907, an indictment was returned and filed against

it in the District Court of the United States for the Western District of Louisiana under the Elkins Act. The indictment was not tried until March, 1914. On the trial that then took place the corporation was adjudged guilty and it was fined $14,000 and costs. A writ of error without supersedeas was allowed to the United States Circuit Court of Appeals for the Fifth Circuit, and that Court on June 23, 1915, affirmed the judgment (*Rec.*, page 30). An execution on the judgment was issued out of the District Court for the Western District of Louisiana, and the United States Marshal for that district on August 2, 1915, made a return of *nulla bona*. The corporation furnished a bond in connection with the writ of error for the costs of the prosecution and on affirmance the surety paid the costs (*Rec.*, pages 17-31). The fine of $14,000 was not paid.

On July 9, 1913, nearly nine months before the trial of the indictment and more than six years after the indictment had been filed, the Waters Pierce Oil Company, pursuant to a request of the holders of more than four-fifths of the capital stock of the corporation, authorized the sale of all of its property to the Pierce Oil Corporation, organized under the laws of Virginia, for $10,500,000 of the common capital stock of the latter corporation and $5,000,000 in cash. Henry S. Priest and Clay Arthur Pierce were appointed by the Board of Directors as agents and trustees of the Waters Pierce Oil Company to receive from the Pierce Oil Corporation this consideration (*Rec.*, page 31). Pursuant to the action thus taken the property of the Waters Pierce Oil Company was on July 7, 1913, conveyed to the Pierce Oil Corporation, and Henry

S. Priest and Clay Arthur Pierce received from the Pierce Oil Corporation the consideration payable for such transfer to the Waters Pierce Oil Company (*Rec.*, page 32), and distributed it pro rata to the several stockholders of the Waters Pierce Oil Company. Henry Clay Pierce received upwards of $3,400,000 in cash and $7,158,375 par value of the stock of the Pierce Oil Corporation, the Pierce Investment Company $1,250,000 in cash and $2,625,000 in stock of the Pierce Oil Corporation, and Clay Arthur Pierce $1,250 in cash and $2,625 in stock of the Pierce Oil Corporation (*Rec.*, pages 32, 33).

After the commencement of this action and on March 19, 1917, an execution was issued out of the United States District Court for the Western District of Louisiana against the Waters Pierce Oil Company, directed to the United States Marshal for the Eastern District of Missouri, and on March 28, 1917, the latter made a return of *nulla bona* on the execution so issued and filed the writ and return in the office of the Clerk of the United States District Court for the Western District of Louisiana on March 31, 1917 (*Rec.*, page 33).

The Waters Pierce Oil Company has no assets out of which judgment can be collected, the transfer to the Pierce Oil Corporation covering all of its assets and property. It has ceased to do business and is no longer a going concern. Henry S. Priest and Clay Arthur Pierce, as trustees of the Waters Pierce Oil Company, prior to the filing of this suit distributed to the stockholders of the Waters Pierce Oil Company all of the money and stocks received by them as trustees from the Pierce Oil Corporation (*Rec.*, page 33).

On February 4, 1916, which was prior to the commencement of this suit, the appellee filed in the District Court of the United States for the Western District of Louisiana a bill of complaint against the Pierce Oil Corporation, in which it sought to enforce against the latter the fine imposed on the Waters Pierce Oil Company and to have it decreed to be a lien upon the property in Louisiana described in the bill of complaint which had been sold and transferred by the Waters Pierce Oil Company to the Pierce Oil Corporation, it being alleged that as a part of the consideration of the transfer by the Waters Pierce Oil Company to it of its property the Pierce Oil Corporation was to assume the payment of all the debts, liabilities and obligations of the Waters Pierce Oil Company (*Rec.*, pages 33, 34, 37-45).

The resolution pursuant to which the transfer was made and the condition on which the stockholders of the Waters Pierce Oil Company consented to the transfer expressly provided that, in addition to the payment of the common stock of the Pierce Oil Corporation and the $5,000,000 in cash, "the assumption by said Pierce Oil Corporation of all the debts, obligations and liabilities of the Waters Pierce Oil Company" was to be a part of the consideration (*Rec.*, pages 35-37).

On the trial of this cause before the Honorable David P. Dyer, Judge of the United States District Court for the Eastern District of Missouri, it was decreed (*Rec.*, page 51), that the judgment obtained by the United States in the criminal proceeding for the sum of $14,000 was a valid and subsisting judgment against the Waters Pierce Oil Company and that "the defendant had divested it-

self of all of its property and had no assets subject to execution under the judgment," that the amounts received by the appellants as the proceeds of their respective holdings in the stock of the Waters Pierce Oil Company were subjected in equity to the payment of the judgment obtained by the United States" against the Waters Pierce Oil Company, and that the appellee should recover from the defendants Henry Clay Pierce, Pierce Investment Trust Company and Clay Arthur Pierce (as an individual) in satisfaction of the judgment obtained as aforesaid in the Western District of Louisiana the sum of $14,000 *with interest at six per cent. thereon from January 29, 1907*, save that as against the defendant Clay Arthur Pierce (as an individual) this judgment is limited to the amount of money so received by him as stockholder-beneficiary aforesaid, namely, $1250.

It was further decreed (*Rec.*, page 51):

> "That the defendant the Waters Pierce Oil Company, a corporation, having divested itself of all its property, and that the defendants Henry S. Priest and Clay Arthur Pierce (as trustees, etc.), having divested themselves of the money, stock, property and effects received of the money, stock, property and effects received by them as trustees and agents of the said The Waters Pierce Oil Company, a corporation, by disbursing the same to the holders of stock in said Waters Pierce Oil Company, a corporation, as beneficiaries—are dismissed from the cause without day."

An appeal was taken from this decree to the United States Circuit Court of Appeals for the

Eighth Circuit, assignments of error being filed as set forth at *Record* pages 52-55. That Court, consisting of Circuit Judges Hook and Stone and District Judge Wade, affirmed the decree, Judge Wade dissenting (*Rec.*, pages 60-64), 257 *Fed. Rep.*, 514. A petition for a rehearing having been filed (*Rec.*, pages 65-71) the petition was denied by a similarly divided court (*Rec.*, pages 72, 260 *Fed. Rep.*, 158).

A writ of error was thereupon allowed to this court, the following assignments of error having been filed (*Rec.*, pages 73-75):

ASSIGNMENTS OF ERROR.

1. That the Court of Appeals erred in refusing to hold that the District Court erred in refusing to dismiss the first amended bill and in overruling appellants' separate motions to that end, for the reason that:

(a) Said amended bill does not state a cause of action cognizable in equity.

(b) Said amended bill is multifarious, in that it sets forth separate and distinct claims or causes of action against separate defendants.

(c) That there is a misjoinder of parties defendant in that stockholders are joined with trustees for a corporation and the alleged claim or cause of action does not affect them in the same capacity or affect the same res.

(d) Said amended bill shows upon its face that complainant therein has a plain, adequate and complete remedy at law.

(e) It appears from said bill that necessary parties defendant, to wit: the remaining stockholders of the Water Pierce Oil Company are not joined as defendants therein.

II. The Court of Appeals erred in failing and refusing to hold that the action of the District Court in compelling appellants to answer to the bill and in awarding a decree against appellants deprived them of rights guaranteed by the Fifth Amendmant to the Constitution of the United States, in that appellants were compelled to answer for an infamous crime without presentment or indictment of grand jury, and were compelled to be witnesses against themselves in a criminal case, and were thus deprived of their property without due process of law.

III. The Court of Appeals erred in failing and refusing to hold that the action of the District Court deprived appellants of a trial by jury in an action for the recovery of a fine under a penal statute, contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

IV. That the allegations of the bill charged defendants with a conspiracy to defraud the United States, in violation of Section 37 of the Penal Code, and that by compelling defendants to answer said bill they have been compelled to be witnesses against themselves and are deprived of a jury trial, in violation of the provisions of the Sixth Amendment to the Constitution of the United States, and the Court of Appeals erred in failing and refusing so to hold.

V. The Court of Appeals erred in failing and refusing to hold that the filing of the suit on February 4th, 1916, by the United States of America against the Pierce Oil Corporation, filed within the Western District of Louisiana upon the same cause of action set forth in the bill herein, constituted an election of remedies, and in failing and refusing to hold that such election barred the maintenance of the present suit.

VI. The Court of Appeals erred in failing and refusing to hold that the filing of a suit by the United States on February 4th, 1916, in the Western District of Louisiana, against the Pierce Oil Corporation, constituted and acceptance of the offer contained in the contract between the Waters Pierce Oil Company and the Pierce Oil Corporation, in which the latter assumed the debts and obligations of the former, and in failing and refusing to hold that the filing of such suit constituted a novation and released the Waters Pierce Oil Company.

VII. The Court of Appeals erred in failing and refusing to hold that under the agreed statement of facts the plaintiff had a plain, adequate and complete remedy at law.

VIII. The Court of Appeals erred in affirming the decree of the District Court in awarding the United States interest from the date of the indictment within the Western District of Louisiana, to wit: January 29th, 1907, when conviction thereupon was not obtained until March 20th, 1914, and erred in affirming the award of interest upon the judgment obtained on said last named date.

IX. The Court of Appeals erred in holding that the judgment for a fine constituted a debt on which

a creditor's bill would lie and enforceable by such civil remedy in equity.

X. The Court of Appeals erred in failing and refusing to hold that such alleged debt, if a debt at all, was not enforceable in this proceeding, for that such debt, if a debt, constituted the United States a subsequent creditor and it is therefore not entitled to maintain this bill.

XI. The Court of Appeals erred in failing and refusing to hold that the suit was prematurely brought, in that at the time of the filing of the original bill no execution had been issued to the Marshal of the Eastern District of Missouri against the Waters Pierce Oil Company and in that no judgment at law had been secured in the Eastern District of Missouri before the filing of said suit.

XII. The Court of Appeals erred in refusing to grant appellants' petition for rehearing for the reasons therein stated.

POINTS.

I.

The judgment imposing a fine on the Waters Pierce Oil Company on its conviction under the Elkins Act did not constitute a debt on which a creditor's bill would lie in favor of the United States against the appellants.

The statute creating the crime of which the corporation was convicted (Act of February 19, 1903, ch. 708, Section 2, Statutes, 847) declares:

"And it shall be unlawful for any person, persons, or *corporation* to offer, grant, or give or *to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier* subject to said Act to regulate commerce and the Acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or *corporation who shall* offer, grant, or give or solicit, *accept or receive any such rebate, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce,* whether committed before or after the passage of this Act, or for offenses under this section, *no penalty shall be imposed on the convicted party other than the fine prescribed by law; imprisonment wherever now prescribed as part of the penalty being hereby abolished.* Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transporation may have been conducted;

> and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

The proceeding in which the judgment of conviction was rendered against Water Pierce Oil Company, was for an infraction of this statute, which was one of the criminal laws of the United States. It was a criminal and in no sense a civil cause. In view of the fact that it was physically impossible to subject the corporation to imprisonment, the statute imposed a fine in lieu of the imprisonment which might have been otherwise provided. By no possibility could the proceeding have been regarded as the enforcement of a civil remedy. It rested upon an indictment. It was tried on the criminal side of the court. No cause of action against the Waters Oil Company either *ex-contractu* or *ex delicto* was pleaded; nor was any obligation, express or implied, sought to be enforced against the corporation in the proceedings that culminated in the sentence imposed. There was, therefore, *ab initio* no debt owing by the corporation to the United States, nor was a debt created in consequence of the infliction of the statutory punishment resulting from the verdict of the jury that pronounced the corporation guilty of the crime charged in the indictment. There being no debt, it necessarily follows that the relation between the Government and the corporation was not that of debtor and creditor, and hence there was no basis for a creditor's bill for the enforcement of the fine imposed.

By the weight of authority a fine inflicted in a criminal proceeding is not a debt.

In *re Sutherland*, 23 Fed. Cas., No. 13, 639;
Hall vs. *Coleman*, 138 Ga., 734; 75 S. E. Rep., 1132;
McCool vs. *State*, 23 Ind., 127, 132;
State vs. *Joseph*, 137 La., 52, 55; 68 S. Rep., 211;
State vs. *Mace*, 5 Md., 337, 350;
Peterson vs. *State*, 79 Neb., 132; 14 L. R. A., N. S., 292;
Ex parte Hollman, 79 S. C., 60; 21 L. R. A., N. S., 242;
In re McDonald, 4 Wyo., 150; 33 Pac. Rep., 18, 20.

It has likewise been held that a fine imposed in a civil proceeding to punish a criminal contempt of court is not a debt.

Spalding vs. *People*, 7 Hill (N. Y.), 301; affd. 4 How., 21, 24.

Nor are costs in a criminal proceeding a debt.

State vs. *Joseph*, 137 La., 52, 55; 68 S. Rep., 211;
In re Long, L. R., 20 Q. B., 316, 318;
Bailey vs. *State*, 87 Ala., 44; 6 S. Rep., 398, 399;
In re Boyd, 34 Kan., 540; 9 Pac. Rep., 240;
Ex parte McInnis, 93 Miss., 773; 54 S. Rep., 260, 261;
McCool vs. *State*, 23 Ind., 127, 131.

It has also been decided that the term "debt" does not include the obligation arising on account of a tort committed, even where a claim in tort has become liquidated by judgment.

Chase vs. *Curtis*, 113 U. S., 452;
Savage vs. *Shaw*, 195 Mass., 571; 81 N. E. Rep., 303;
Child vs. *Boston & Fairhaven Iron Works*, 137 Mass., 516, 519;
Perry vs. *Orr*, 35 N. J. Law, 295;
Kirkland vs. *Kille*, 99 N. Y., 390, 395;
Heacock vs. *Sherman*, 14 Wend., 58;
Esmond vs. *Bullard*, 16 Hun, 65, 68;
Henley vs. *Meyers*, 76 Kan., 723.

Chase vs. *Curtis*, *supra*, was an action to enforce against the trustees of a corporation a liability for its debts because of their failure to file the reports of capital and of debts required by the statute. The plaintiff's claim against the corporation was in tort. This, it was held, was not a debt which could be made the basis of a liability against the trustees.

A fine is not a debt within the meaning of a constitutional prohibition against imprisonment for debt.

In re McDonald, 4 Wyo., 150;
McCool vs. *State*, 23 Ind., 127;
Ex parte Robertson, 27 Tex. App., 628;
Peterson vs. *State*, 79 Neb., 132;
Chicago vs. *Morell*, 247 Ill., 383.

It is not a debt provable in bankruptcy, nor is it discharged by bankruptcy.

Spalding vs. *People*, 7 Hill, 301, affd. 4 How., 21, 24;
In re Sutherland, 23 Fed. Cas., 456, 457;
In re Southern Steel Co., 183 Fed. Rep., 498.

Nor is a fine a "debt contracted" within the meaning of the law exempting homesteads from levy in satisfaction of a debt.

Whitcacre vs. *Rector*, 29 Gratt. (Va.), 714;
Clark vs. *Allen*, 114 Fed. Rep., 374, affd. 126 Fed. Rep., 738.

By analogy, a judgment for alimony is not a debt.

Audubon vs. *Shufeldt*, 181 U. S., 575.
Dunbar vs. *Dunbar*, 190 U. S., 340;
Wetmore vs. *Wetmore*, 196 U. S., 68;
Romaine vs. *Chauncey*, 129 N. Y., 566;
Turner vs. *Turner*, 108 Fed. Rep., 785;
Lind vs. *Lind*, 64 N. J. Eq., 736;
Chase vs. *Ingalls*, 97 Mass., 524, 530;
Fickel vs. *Granger*, 83 Ohio, 101; 32 L. R. A., N. S., 270;

Neither are taxes "debts."

Merriweather vs. *Garrett*, 102 U. S., 472, 513;
Lane vs. *Oregon*, 7 Wall, 71;
New Jersey vs. *Anderson*, 203 U. S., 483, 492;
City of Boston vs. *Turner*, 201 Mass., 190, 193.

However defined, a "creditor" is the correlative of a "debtor." The term is ordinarily used as the antonym of "debtor" and involves a debt and a credit.

City of Boston vs. *Turner*, 201 Mass., 190, 193;
Herbert vs. *Handy*, 29 R. I., 543; 72 Atl. Rep., 1102, 1104.

Mr. Justice Patterson, in *Ware* vs. *Hylton*, 3 Dallas, 249 said:

"Creditors must have debtors; 'debtors' is the correlative term."

Mr. Justice Iredell, in *Ware* vs. *Hylton*, 3 Dallas, 278 said:

"There can be no creditor, without two correlatives, a debtor and a debt."

Said the Court in

Moler vs. *Minnesota Elevator Co.*, 40 Minn., 343:

"If there is no debtor, there can be no creditor."
"A creditor is universally defined as a person to whom a debt is owing."

Nicolin vs. *Weiland*, 55 Minn., 130; s. c., 56 N. W. Rep., 587;
Woolverton vs. *Taylor*, 43 Ill. App., 424, 426;

II.

The contention that a judgment imposing a fine for an offense against the laws of the United States is enforceable by creditor's bill, because of Section 1041 of the United States Revised Statutes cannot be sustained.

That section reads as follows:

> "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, *may be enforced by execution against the property of the defendant* in like manner as judgments in civil cases are enforced: Provided, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."

Shortly after the enacement of this section it was interpreted in *In re Teuscher*, 23 Fed. Cas., page 867, by Judge Treat, who said:

> "Prior to the act of 1872, in all criminal proceedings, fines and penalties that became part of the sentence were enforced, either by the judgment of the court that the party

should stand imprisoned until the fine or penalty was paid, or omitting that clause, leaving the district attorney to issue his *capias pro fine*. In 1872 Congress passed a very important act, regulating the practice and proceedings of the United States courts. It took occasion in that act, by what is now known as Section 1041 of the Revised Statutes, for the first time to adopt an alternative mode of making good to the government the amount of penalty or fine. By the terms of that provision the fine or penalty might be collected by an execution for the first time in the history of the government. It, of course, was not designed by this act that that should be the exclusive mode, but either one mode or the other might be adopted, to wit: either what is generally known now by the term 'execution' or a capias.

"Now, 'execution,' as used in this act, is what is known by the profession generally, the country over, as *fi. fa.* If nothing had been said in this judgment concerning the mode of enforcing it, then the district attorney, at his election, might have adopted one or the other process; but the court, for reasons satisfactory to itself at the time, imposed what was the minimum punishment under the statute in these particular cases. * * * The court might have ordered these parties to stand committed until their fines were paid. Had it done so they would have been so committed, and then at the expiration of thirty days, under the provisions of Section 1042 of the Revised Statutes, they could have been discharged on showing their pauperism."

A reference to the opinion of Mr. Justice Story in *Ex parte Watkins*, 7 Pet., 568, 574, confirms the accuracy of the explanation of Judge Treat as to the manner in which a fine was enforced prior to 1872:

> "At the common law, whenever a fine and imprisonment constitute a part of the judgment upon a conviction in a criminal case, the judgment, if the party is in court, is that he be committed to jail in execution of the sentence, and until the fine is paid. If he is not then in court, a special writ of *capias pro fine* issues against him; the exigency of which is that his body be taken and committed to jail until the fine is paid."

The statute constitutes a part of the criminal law of the United States, which is wholly statutory. Its language cannot, therefore, be extended so as to include within it what is not expressly set forth. But for the statute it would have been unlawful to enforce a fine by execution. The execution which it permits to be employed for the enforcement of the fine is expressly limited to an *execution* "against the property of the defendant."

The term "execution" has a well-known signification. It is a writ issued upon a judgment that commands the officer to whom it is addressed to levy on goods, chattels, lands and tenements of the judgment debtor and to sell such property in the manner prescribed by law and to apply the proceeds to the payment of the judgment.

Labette County Commrs. vs. *United States*, 112 U. S., 217.

People vs. *Cicotte*, 15 Mich., 336, 338.
Brown vs. *United States*, 6 Ct. Cl., 171, 178.
Kelly vs. *Vincent*, 8 Ohio St., 415, 420.

An execution against the property of a defendant does not include the filing of a creditor's bill in an independent suit on the equity side of the court after the remedy by execution has been exhausted. The law-makers have limited the remedy to the issuance of an execution for the seizure of the defendant's property. Had it been intended to confer on the Government the right to proceed in equity for the enforcement of other remedies than that afforded by the writ of execution, it would have been easy to have so provided. The failure to have done so must be regarded as a negation of the power.

I Federal Statutes Annotated (2nd ed), pages 41, 42.
U. S. vs. *First National Bank*, 234 U. S., 262.
Baltimore R. R. Co. vs. *Grant*, 98 U. S., 463.
Tillson vs. *U. S.*, 100 U. S., 46.

In this connection it will be interesting to note the application of the principle of Section 1041 in *Allen* vs. *Clark*, 126 Fed. Rep., 738.

In the present case the execution was issued out of the United States District Court for the Western District of Louisiana, directed in the first instance to the United States Marshal of that district. He having returned the execution *nulla bona* a second execution was subsequently issued out of

the same Court directed to the United States Marshal for the Eastern District of Missouri, who likewise returned the execution *nulla bona*. That ended the proceedings in the tribunal in which the judgment against the defendant in the criminal proceedings had been rendered. The executions issued against its property were found to be incapable of enforcement. They had in fact spent their force. They were found inadequate to reach the property of the defendant, because it had none. It was then that this creditor's suit was instituted in the District Court of the United States for the Eastern District of Missouri, a different tribunal from that in which the judgment had been rendered, and the equity jurisdiction of that Court was invoked against other parties. It is impossible by interpretation to bring such a suit as the present within the purview of the phrase "enforced by execution against the property of the defendant," employed in Section 1041.

The incongruity of appellee's contention becomes apparent when one considers that the decree rendered in the present suit expressly eliminates the Waters Pierce Oil Company and, in so many words, dismisses it from the cause, without day, it being adjudged to have "divested itself of all its property" and to have "no assets *subject to execution* under said judgment" obtained against it by the appellee (*Record*, page 51). The Court having thus decreed that the defendant upon whom the fine had been imposed had no property against which an execution could be enforced, decreed judgment against the present appellants and the issuance of execution against *their* property in satisfaction of the judgment rendered in the criminal cause, to which they were not parties, against

the Waters Pierce Oil Company in the United States District Court for the Western District of Louisiana.

Considering this proceedure as an attempt to enforce the criminal law of the United States, that effort must fail because the statute on which it is sought to be predicated contains no grant of power warranting the remedy pursued or the decree rendered, which goes far beyond any authority conferred by any act of Congress. This is a corollary to the propositions that, so far as the United States is concerned, there are no common law offenses, the whole criminal jurisdiction of its courts, including the definition of crimes and the prescription of the punishment to be meted out to an offender and the procedure to be followed in connection therewith, must be found in acts of Congress, which being penal legislation, must be strictly interpreted.

> *Jones* vs. *United States*, 137 U. S., 211;
> *United States* vs. *Hudson*, 7 Cranch., 32;
> *United States* vs. *Britton*, 108 U. S., 199, 206;
> *Manchester* vs. *Massachusetts*, 139 U. S., 240, 262, 267;
> *United States* vs. *Eaton*, 144 U. S., 677, 687;
> *In re Greene*, 52 Fed. Rep., 104.

Nor does *Section* 916 of the *United States Revised Statutes* apply. It reads:

> "The party recovering a judgment *in any common law cause* in any circuit or district court shall be entitled to similar remedies upon the same *by execution or otherwise* to reach

the property of the judgment debtor as are now provided in like causes by the laws of the state in which such court is held or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may from time to time by general rule adopt such state laws as may hereafter be in force in such state in relation to remedies *upon a judgment as aforesaid by execution or otherwise.*"

This section, together with Section 1041 of the Revised Statutes, had its genesis in the statute entitled "An act to further the administration of Justice," approved June 1, 1872 (17 St. L., 197, 198). While Section 1041 refers to a judgment or sentence imposing the payment of a fine in a criminal cause and provides for its enforcement by execution against the property of the defendant, Section 916 is expressly limited in its operation to a judgment recovered in a "common law cause." Hence it has no relation whatsoever to a judgment of the character expressly referred to in Section 1041, which deals exclusively with a judgment for a fine, imposed in a criminal or penal cause.

A "common law cause" has been defined as relating solely to a judgment at law. It therefore does not include a judgment in equity (*Board* vs. *Zachary,* 6 Pet., 635), or in admiralty (*The Blanche Page,* 16 Blatchf., 1), or in a criminal case (*Clark* vs. *Allen,* 114 Fed. Rep., 374, affd. 126 Fed. Rep., 738). From the very fact that a criminal case instituted in a federal court is a statutory proceeding, it must necessarily follow that it is not, and cannot be, a "common law cause."

Irrespective of these considerations, the very framework of Section 916 shows that it does not embrace remedies in equity by independent suit which may have been given by the statutes of a State, but is limited by the phrase "in like causes" to remedies provided in actions at law wherein judgments are recovered.

Hudson vs. *Wood*, 119 Fed. Rep., 764.

In that case, Judge Evans, dealing with this phase of the subject, said:

> "Construed in reference to the maxim *'ejusdem generis,'* there would, even in the absence of authority, be great doubt in the mind of the Court whether section 916, Rev. St., embraces remedies in equity at all, or whether its provisions are not limited and confined to legal remedies, such as the old writs of fieri facias, mandamus, and the like, and to any other legal process or remedy which the states may invent or bring into vogue. These doubts are increased when we read section 6 of the act of 1872, and carefully analyze the words of that section in connection with the maxim referred to. Nor are they diminished when we reflect that the Constitution itself has made it essential that great care should be taken to keep separate and distinct the respective remedies at law and in equity. *Fenn* vs. *Holme*, 21 *How.*, 484; *Bennett* vs. *Butterworth*, 11 *How.*, 669. Only 'judgments at law' are in terms referred to in the section, and the remedies made available in this court by it are such as are provided by the laws of Kentucky 'in like causes' by 'execution or otherwise.' The

United States having no common law of its own in 1789, and no general Code of Practice being desirable, Congress, which has the exclusive power to regulate practice in the national courts, no doubt concluded that it was not only appropriate, but essential, for it to authorize the courts of the United States in actions not equitable to use such remedies and writs as were used 'in like causes'—that is, actions at law wherein judgments were recovered—in the States where the court sat. But while this, at that early date, gave the courts ample powers in actions at law, it was not meant, as it seems to us, and as will, we think, be clearly shown by the authorities, to affect, in any manner, remedies in equity, which were to be governed by other rules. Indeed, the court has industriously, but in vain, searched for authority which shows the applicability of section 916 to remedies in equity, and it may be more than doubted whether the power to use as equitable those remedies which are essentially remedies at law can be bestowed by State legislation upon the Federal Courts, although it is clear enough that, if new rights which are equitable in their nature be conferred by State legislation, they may be made available in the Federal Courts, if it can be done pursuant to the modes of equity procedure established by the Supreme Court or by Federal laws, or even in some instances by State laws, where the right and the remedy are practically the same things. *Gormley* vs. *Clark,* 134 U. S., 348, and cases collected in 8 *Notes,* U. S. Rep., 464, 465. But this in no wise depends upon section 916."

Ex parte Boyd, 105 U. S., 647, which arose under Section 916, merely presented the question as to whether or not a party in whose favor a judgment was rendered in a common law cause by a court of the United States sitting in the State of New York was entitled to the remedy provided by the statute of that State known as proceedings supplementary to execution. Those proceedings were taken in a common law action. They were not independent proceedings in equity. They involved merely the right of discovery as practised in common law actions brought in that State. As was said by Mr. Justice Matthews:

> "There is certainly nothing in the nature of an examination of a judgment debtor, upon the question as to his title to and possession of property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, which would render it inappropriate, as a proceeding at law, under the orders of the court, where the record of the judgment remains, and from which the execution issues. Such examinations are familiar features of every system of insolvent and bankrupt laws, the administration of which belongs to special tribunals, and forms no necessary part of the jurisdiction in equity. It is a mere matter of procedure, not involving the substance of any equitable right, and may be located, by legislative authority, to meet the requirements of judicial convenience."

To the same effect is *Railroad Co.* vs. *Hart*, 114 U. S., 654, which was decided on the authority of ***Ex parte Boyd, supra.***

The present action was brought in an entirely different jurisdiction from that in which the indictment against the Waters Pierce Oil Company was tried and where the fine was imposed. It was an independent suit in equity in which purely equitable relief was sought.

Not even the Court by which the fine was adjudged could have assumed jurisdiction in the criminal cause to grant the relief adjudged in the present suit.

As was said by Mr. Justice Field in

Windsor vs. *McVeigh*, 93 U. S., 274, 282:

> "All courts, even the highest, are more or less limited in their jurisdiction: *they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable;* or to transactions of a special character, such as arise on navigable waters or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. *It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a*

contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will."

The converse of this proposition must likewise be true. If the proceeding is one brought on the criminal side of the Court, equitable relief cannot be granted to the prosecuting government against the defendant and *a fortori* such relief cannot be awarded against third parties.

III.

The transfer by the Waters Pierce Oil Company of its property to the Pierce Oil Corporation having been made in good faith nearly a year prior to the imposition of the fine, even were the trust fund theory otherwise applicable, it does not inure to the benefit of one not a creditor at the time of the transfer and distribution of the corporate property.

There has been no suggestion that the transfer was made with an actual fraudulent intent. The bill of complaint contains no allegation of fraud; nor does the agreed statement of facts intimate that any of the defendants harbored a fraudulent intent.

In *Graham* vs. *Railroad Co.*, 102 U. S., 148, it was decided that where a corporation, solvent at the time and having no actual intent to defraud creditors, disposes of its lands for an inadequate consideration or by voluntary conveyance, its subsequent creditors cannot question the transaction.

Mr. Justice Bradley concluded his opinion with this statement:

> "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds, trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each."

In Horbach vs. Hill, 112 U. S., 144, 149, the rule applicable to a transfer by an individual was thus stated by Mr. Justice Field:

> "The complainant not showing that he was at the time a creditor, cannot complain. Even a voluntary conveyance is good as against *subsequent* creditors unless executed as a cover for future schemes of fraud."

While we contend, as shown under previous Points, that the United States never became, and is not, a creditor of the Waters Pierce Oil Company because of the imposition of a fine after its conviction under the indictment found in 1907, in no view of the case could it have become a creditor until after the trial, conviction and imposition of

the fine. All of these acts occurred nearly a year after the disposition of the property. Hence, if the United States became a creditor at all, it was not a creditor at the time of the transfer, but only became a subsequent creditor of the corporation.

In *Hollins* vs. *Briercfield Coal & Iron Co.*, 150 U. S., 371, 383, 385, *Graham* vs. *Railroad Co.*, *supra*, was cited in elucidation of the trust fund theory, and commenting on it, Mr. Justice Brewer said:

> "With reference to the suggestion in this last paragraph, it may be observed that the Court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is, that when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself. In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, place the property in a condition of trust, first,

for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. *It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.*"

See also:

Wabash, St. Louis & Pacific Ry. vs. *Ham,* 114 U. S., 587;
Fogg vs. *Blair,* 133 U. S., 534, 541.

In *McDonald* vs. *Williams,* 174 U. S., 397, it was held, on the authority of these cases, that the receiver of a National Bank cannot recover a dividend paid to a stockholder not at all out of profits but entirely out of capital when the stockholder receiving such dividend acted in good faith believing the same to be paid out of profits and when the bank at the time such dividend was declared and paid was not insolvent.

See also:

McDonald vs. Dewey, 202 U. S., 529;
Wallace vs. Penfield, 106 U. S., 260, 262;
Horbach vs. Hill, 112 U. S., 144, 149.
Schreyer vs. *Scott,* 134 U. S., 409, 410;
Lant vs. *Manley,* 71 Fed. Rep., 18;
Merchants Bank vs. *Thomas,* 121 Fed. Rep.;
Montgomery vs. *Whitehead,* 40 Col., 327; 11 L. R. A., N. S., 230;

Boston Trust Co. vs. *Merchants Telegraph Co.*, 36 Fed. Rep., 297;
Coe vs. *East & West Ry. Co.*, 52 Fed. Rep., 534;
Toledo R. R. Co. vs. *Continental Trust Co.*, 95 Fed. Rep., 519, 528;
Whitney vs. *Kelly*, 94 Cal., 148, 49;
Savings Bank vs. *Ritchie*, 121 Fed Rep., 956, 959;
Coleman vs. *Hagey*, 252 Mo., 102, 135.

Judge Hook regards *Swan Land and Cattle Co.* vs. *Frank*, 148 U. S., 603, as "the nearest approach to the case at bar in its facts." An examination of that decision does not sustain that conclusion. The plaintiff there had a claim for unliquidated damages against a corporation which had not been dissolved but had merely distributed its corporate funds among its stockholders and ceased or suspended business. Without reducing the claim to judgment the plaintiff sued on the equity side in the United States Circuit Court some of the stockholders of the corporation to reach and subject the assets so received by them to the payment and satisfaction of his claim, without making the corporation a defendant and bringing it before the court. It was decided that without having first exhausted his remedies at law and without bringing the corporation before the Court, he could not maintain the action, the corporation being an indispensable party.

In this aspect there is a strong resemblance between the case cited and the present. While it is true that the Waters Pierce Oil Company was originally made a defendant, by the very judgment now sought to be revieved it was decreed that the Waters Pierce Oil Company should be dismissed from

the cause "without day." For all practical purposes, therefore, that corporation was not, and is not before the Court, and the *sine qua non* of relief in equity is lacking.

See also:

Dearfield vs. *Nimms*, 110 Mass., 115;
Gaylord vs. *Kelshaw*, 1 Wall., 81, 82.

In discussing the theory of the bill in *Swan Land & Cattle Co.* vs. *Frank* (*supra*), Mr. Justice Jackson said:

> "The theory of the bill is, that the assets of the vendor corporations which have been distributed to and received by the defendants as stockholders constitute a trust fund for the payment of all debts and judgments against the companies, and may, therefore, be followed in the hands of, and recovered from, such stockholders, to the extent necessary to discharge valid claims against the corporations from which they were received. The funds sought to be reached are undoubtedly applicable, under proper proceedings, against all necessary parties, to the payment, so far as may be needed, *of all outstanding indebtedness against the corporations which distributed the same;* but the difficulty here is that the complainant has not adopted the requisite and necessary procedure to subject said funds thereto."

It is thus evident that, before such an action as the present can be maintained, there must have existed at the time of the distribution of the corporate assets an outstanding indebtedness against the corporation. Such is not the case here.

IV.

The creditor's bill in this case was prematurely brought, because at the date of its filing no execution had been issued or returned nulla bona against the Waters Pierce Oil Company in Missouri.

A creditor's bill can only be brought by a creditor who has exhausted his legal remedy. This suit was filed in the United States District Court for the Eastern District of Missouri on February 18, 1916 (*Rec.*, page 8). No execution was issued in that district until March 19, 1917, and was not returned *nulla bona* until March 28, 1917 (*Rec.*, page 33).

In *National Tube Works Co.* vs. *Ballou*, 146 U. S., 517, a creditor's bill brought in the Circuit Court of the United States for the Southern District of New York was dismissed where it was merely shown that a judgment had been obtained against the debtor in Connecticut and an execution was there returned unsatisfied, there being nothing in the bill to indicate that the plaintiff had recovered a judgment against the corporation in any court within that State or issued an execution within the State.

Legal remedies must be exhausted before suit brought. The defect cannot be subsequently supplied.

12 *Cyc.*, 25;
Wee vs. *Delahaye*, 95 Iowa, 667;
Bank vs. *McCormick*, 44 Atl. Rep., 706.

V.

At the time when this suit was brought the Government had instituted a suit in the Western District of Louisiana against the Pierce Oil Corporation for the recovery of the amount of the fine imposed on the Waters Pierce Oil Company, based on the assumption of all of the debts, obligations and liabilities of the Waters Pierce Oil Company. The bringing of such suit constituted an irrevocable election of remedies.

By bringing this action the Government asserted that the Pierce Oil Corporation had become its debtor by virtue of the assumption clause in the contract whereby the property of the Waters Pierce Oil Company had been acquired. That operated as a novation.

> *Friedenwald Co.* vs. *Asheville Tobacco Works*, 117 N. C., 544.

At all events, having treated the Pierce Oil Corporation as obligated to pay the fine that had been imposed on the Waters Pierce Oil Company under the covenant which constituted a part consideration for the transfer by the latter Company of its property to the covenantor, the appellee, by bringing a suit against the Pierce Oil Corporation upon such covenant ratified the transfer. There was a manifest inconsistency in subsequently suing the appellants on the theory that the transfer by the Waters Pierce Oil Company to the Pierce Oil

Corporation was wrongful and that a part of the consideration received and distributed was a trust fund for the benefit of creditors. This certainly amounts to blowing hot and cold at the same time. The transfer was either voidable as against the appellee, or it was valid. It could not be both. When, therefore, the appellee undertook to recognize the transfer by suing for the consideration, it could not thereafter be heard to question the validity of the transfer. An election of remedies once made under such circumstances must be regarded as irrevocable.

Fowler vs. *Bowery Savings Bk.*, 113 N. Y., 450;
Whalen vs. *Stuart*, 194 N. Y., 505;
Moller vs. *Tuska*, 87 N. Y., 166;
Bach vs. *Tuch*, 126 N. Y., 53;
Morris vs. *Rexford*, 18 N. Y., 352;
Acer vs. *Hotchkiss*, 97 N. Y., 395;
Conrow vs. *Little*, 115 N. Y., 387;
Terry vs. *Munger*, 121 N. Y., 161;

In *Fowler* vs. *Bowery Savings Bank, supra*, White made a deposit with defendant in trust for his wife, plaintiff's executrix, receiving a passbook. After the death of both husband and wife and the issuance of letters testamentary on the wife's estate to plaintiff he called on the defendant and demanded payment of the deposit. He was informed that it would be paid him when he came with the passbook, which was in the possession of the husband's executor. The latter presented the passbook with proof of his appointment, and defendant then paid him the deposit on surrender

of the passbook. After learning of this payment the plaintiff brought suit against the husband's executor, and being unable to collect the judgment recovered, sued the bank. It was held that the plaintiff could have brought either an action against the defendant to recover the deposit or on against the husband's executor for money had and received, that by electing the latter remedy he lost the former, since by so doing he had adopted and ratified the action of defendant in making the payment.

The opinion follows *Scarf* vs. *Jardine* L. R. 7 App. Cases 345 and *Rawson* vs. *Turner* 4 Johns, 469, which in principle resemble the present case.

VI.

It was plain error for the Courts below to award judgment against the appellants not only for the amount of the fine but for interest thereon from the date of the indictment, more than seven years anterior to the conviction and sentence of the Waters Pierce Oil Company.

Under Point I we have discussed the peculiar nature of a fine imposed by way of punishment on a conviction in a criminal case. To the authorities cited, there should now be added those in which it has been adjudged that, where a defendant against whom a fine has been imposed dies before the fine has been paid, the fine cannot be collected from his estate.

United States vs. *Mitchell*, 163 Fed. Rep., 1014; aff'd sub. nom. *United States* vs. *Dunne*, 173 Fed. Rep., 254.

United States vs. *Pomeroy*, 152 Fed. Rep., 279.

Dyer vs. *United States*, 186 Fed. Rep., 623.

United States vs. *Theurer*, 213 Fed. Rep., 964.

In *People ex rel. Warfield* vs. *Sutter Street Ry. Co.*, 129 Cal., 545, 62 Pac. Rep., 104, a fine of $5,000 was imposed on the defendant because of its usurpation of a franchise. After judgment had been affirmed on appeal the defendant tendered $5,000 and costs, but refused to pay interest on the fine. The Civil Code provided that interest shall be payable on judgments recovered in the courts of the that the fine imposed upon the defendant did not State at seven per cent. It was nevertheless held carry interest, the Court saying:

> "The defendant in this case was not fined for the purpose of compensating the State, nor for the purpose of returning to it anything that had heretofore belonged to it. The judgment of fine was solely for the purpose of punishment, and was not based on any evidence of loss or damage, but rested (within the limit prescribed by the statute) solely within the discretion of the court. It would, we think, be more proper to speak of it as a sentence or judgment imposed on the defendant than to say that it was a judgment recovered against him. * * * On no theory of compensation

to the State for the use or detention of money can interest be allowed on the judgment. The defendant was never indebted to the State, and the money derived from the fine imposed on defendant was not to be paid into the State treasury until it should be collected."

In *State* vs. *Steen*, 14 Tex., 396, 398, the defendant was convicted of a crime was fined $250, and appealed to the Supreme Court, which affirmed the judgment. The question then arose as to whether the Court could discharge the defendant upon payment of the principal of the judgment without interest. It was held that interest was not collectible, the Court saying:

"A fine, it is true, is a judgment. In criminal law it is a pecuniary punishment imposed by the judgment of a court upon a person convicted of a crime. But we do not think it such a judgment as comes within the intention of the law allowing interest upon judgments. * * * It is imposed as a punishment solely, and its payment, as the term imports, is an end of the punishment. * * * There is equity and justice in allowing interest to be recovered upon judgments rendered upon pecuniary demands; but it is not easy to perceive what equity there can be in requiring punishments to accumulate by the lapse of time, or upon what principle the State can demand that fines shall accumulate in the form of interest."

In *United States* vs. *Jacob Schmidt Brewing Co.*, 254 Fed. Rep., 714, the defendant had been con-

victed of shipping intoxicating liquors without properly marking the package which contained them. It was found guilty and was fined $7,250. It sued out a writ of error to review the judgment, which was affirmed. The question then arose as to whether the payment of interest on the amount of the fine could be enforced. Holding in the negative, Judge Amidon said:

> "At common law a judgment does not bear interest as an absolute matter of right. Whether interest is recoverable depends upon the nature of the judgment, and as a rule upon whether interest is awarded by some statute upon all judgments of the class to which the particular judgment belongs. Judgments imposed as a punishment for the violation of a criminal law stand in a class by themselves. * * * This subject, however, is settled for federal courts by Section 966 of the Revised Statutes. * * * Congress having undertaken to deal with the subject of interest upon judgments, and having expressly restricted the allowance of interest to judgments in civil causes, the implication is strong that judgments in criminal causes do not bear interest."

Section 966 of the *United States Revised Statutes,* just referred to and which would seem to be controlling, reads as follows:

> "Interest shall be allowed on all judgments *in civil causes,* recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in

> which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated *from the date of judgment*, at such rate as is allowed by law on judgments recovered in the courts of such state."

As was pointed out by Judge Amidon, this statutory provision refers solely to judgments "in civil causes." That necessarily excludes judgments in criminal cases.

As was said by Mr. Justice Brown in *United States* vs. *Verdier*, 164 U. S., 218:

> "But interest being a matter of purely statutory regulation, we are bound to give or withhold it as the statute directs."

Here the statute merely directs the allowance of interest on judgments in civil causes. This implies a withholding of it from judgments which do not come within that description.

It has also been held that this section does not refer to decrees in equity.

Hagerman vs. *Moran*, 75 Fed. Rep., 97.

See also,

Perkins vs. *Fourniquet*, 14 How., 328.

Not only did the District Court allow interest on the judgment entered upon the fine, but it made the interest retroactive as of the date of the filing of the indictment, January 29, 1907, although the trial did not take place and the fine was not im-

posed until March 20, 1914. This entirely ignores the express limitation of *Section* 966 of the *United States Revised Statutes*, which declares that where interest is allowed on judgments in civil causes "it shall be calculated from the date of the judgment." Here the calculation covered a period of more than seven years before the date of the judgment.

The mere statement of these facts plainly points out the commission of a grave error. The matter was called to the attention of the United States Circuit Court of Appeals by the petition for a rehearing (*Rec.*, pages 65, 66). The majority of the Court, however, denied the petition on the ground that the question was not raised by the assignments of error and briefs on the hearing (*Rec.*, page 72). Although it was not presented *ipsissimis verbis* by the assignments of error, it was nevertheless covered by the 16th assignment (*Rec.*, page 54), which reads:

> "16. That the decree entered in this cause is inequitable, unjust, unfair and unconscionable."

The authorities above cited indicate that the allowance of interest on a fine is inequitable in any case. Its allowance for a period long antedating the imposition of the fine and to an extent equivalent to forty-three per cent. of the amount of the fine, was not only inequitable, but also unjust, unfair and unconscionable.

An examination of appellants' brief in the Circuit Court of Appeals shows that, at page 20, the following statement was made, although not in the form of an independent point:

"A fine does not bear interest. It is very different from an ordinary judgment. *State* vs. *Streen*, 14 Tex., 396-398; *People* vs. *Ry.*, 129 Cal., 545, 79 Am. St. R., 137."

The assignments of error filed on the allowance of the appeal to this Court, as shown above, include the following (*Rec.*, page 75):

"VIII. The Court of Appeals erred in affirming the decree of the District Court in awarding the United States interest from the date of the indictment within the Western District of Louisiana, to wit, January 29, 1907, when conviction thereupon was not obtained until March 20, 1914, and erred in affirming the award of interest upon the judgment obtained on said last named date."

Even had there been no sufficient assignment of error either on the appeal to the Circuit Court of Appeals or to this Court, under Rules XXI and XXXV "the court at its option may notice a plain error not assigned or specified."

The instances in which this power has been exercised are numerous.

World's Columbian Exposition vs. *Republic of France*, 91 Fed. Rep., 64.
United States vs. *Pena*, 175 U. S., 500.
Behn vs. *Campbell*, 205 U. S., 403.
Weems vs. *United States*, 217 U. S., 349.
Columbia Heights Realty Co. vs. *Rudolph*, 217 U. S., 547.
Briscoe vs. *Rudolph*, 221 U. S., 547.

Central Improvement Co. vs. *Cambria Steel Co.*, 201 Fed. Rep., 811.
A. Santaella & Co. vs. *Otto F. Lange Co.*, 155 Fed. Rep., 719.

This was a suit in equity which was tried on an agreed statement of facts. For that reason also the liberal rule has been applied in some jurisdictions—that since the appeal brings up the entire record, it is in itself a sufficient assignment of error.

Mershon vs. *Morris*, 148 N. C., 48; 61 S. E. Rep., 647.
In re Davidson, 21 Cal. App., 118; 131 Pac. Rep., 67.

VII.

It is respectfully submitted that the decrees of the District Court of the United States for the Eastern District of Missouri and of the United States Circuit Court of Appeals for the Eighth Circuit should be reversed and the bill of complaint dismissed, with costs.

LOUIS MARSHALL,
Appellant's Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

CLAY ARTHUR PIERCE, HENRY CLAY PIERCE, and Pierce Investment Trust Company, Petitioners,
v.
UNITED STATES OF AMERICA.
No. 538.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

STATEMENT OF THE CASE.

This is a suit in the nature of a creditor's bill brought by the United States in the United States District Court for the Eastern District of Missouri against the Waters-Pierce Oil Company and certain of its stockholders to recover the amount of a judgment obtained against that company in the United States District Court for the Western District of Louisiana.

In January, 1907, the Waters-Pierce Oil Company, a Missouri corporation, was indicted in the United States District Court in Louisiana for receiving rebates on interstate shipments contrary to the